Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

IN THE MATTER OF THE CARE AND TREATMENT
OF MICHAEL T. CRANE,

STATE OF KANSAS,

Petitioner,

v.

MICHAEL T. CRANE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kansas

PETITION FOR A WRIT OF CERTIORARI

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45 pp

QUESTION PRESENTED

Whether the Fourteenth Amendment's Due Process Clause requires a State to prove that a sexually violent predator "cannot control" his criminal sexual behavior before the State can civilly commit him for residential care and treatment?

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OPINION BELOW

The July 14, 2000, decision of the Kansas Supreme Court is reported at 269 Kan. 578, 7 P.3d 285, and is included in the petition appendix.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Kansas Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a). The Kansas Supreme Court issued its decision in this case on July 14, 2000. Kansas filed a timely petition for reconsideration which that court denied on September 26, 2000. This petition has been filed within ninety days of that date, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The "Due Process Clause" of the Fourteenth Amendment provides that

> "nor shall any State deprive any person of . . . liberty . . . without due process of law . . . ."

U.S. Const. amend. XIV.

The Kansas Sexually Violent Predator Act ("KSVPA" or "Act") defines a "sexually violent predator" as

> "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence."

Kan. Stat. Ann. 1999 Supp. § 59-29a02(a).

The Act defines "mental abnormality" as

> "a . . . condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."

Kan. Stat. Ann. 1999 Supp. § 59-29a02(b).

Lastly, the KSVPA declares the phrase "likely to engage in repeat acts of sexual violence" to

> "mean[] that the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others."

Kan. Stat. Ann. 1999 Supp. § 59-29a02(c).

STATEMENT

1. *Nature of the Suit.*

This case is an involuntary civil commitment proceeding against Michael Crane under the Kansas Sexually Violent Predator Act. Kan. Stat. Ann. § 59-29a01 *et seq.* Crane has prior convictions for lewd and lascivious behavior (exposing himself to a tanning salon attendant) and aggravated sexual battery (physically attacking a video store clerk, attempting to force her to perform oral sex, and threatening to rape her), arising from two separate incidents. Pet. App. 2a-3a. This civil commitment proceeding was initiated near the end of Crane's sentence on the latter charge. *Id.* at 3a. Ultimately, the trial court ordered Crane committed to a state facility for residential care and treatment. Crane appealed to the Kansas Supreme Court, which reversed the trial court on the constitutional ground presented for review in this petition.

2. *The Trial Court Proceedings.*

In the trial court, Crane argued that he could not be committed constitutionally absent a showing that he was totally unable to control his criminal sexual behavior. Pet. App. 22a-23a. The trial court rejected his constitutional claim as follows:

> The Court finds the commission of a sexual crime and the existence of a mental abnormality or personality disorder which makes the person likely to engage in future predatory acts of violence are separate concepts and not interdependent upon one another in the sexually violent predator context. The Court denies Respondent's Motion for Summary Judgment stating as a matter of law that Respondent misinterprets the holding of Kansas v. Hendricks, by arguing the State must prove the existence of a mental disorder that so impairs the volitional control of Respondent as to render him unable to control his dangerous behavior. The Court holds the State must only prove the existence of a mental disorder that makes Respondent likely to reoffend.

Id. 23a (internal citations omitted).

In the trial court, "the State presented evidence of Crane's inappropriate sexual behavior on several occasions as well as the testimony of mental health professionals." Pet. App. 3a. Psychologists testified that Crane suffers from antisocial personality disorder and exhibitionism, with increasing frequency and intensity of his criminal sexual behavior. *Id.* Thus, the State proved both that Crane suffers from a personality disorder or mental abnormality and that he is likely to reoffend if he does not undergo further treatment. The State did not prove that Crane has a total lack of control over his criminal sexual behavior.

3. *The Kansas Supreme Court.*

The Kansas Supreme Court began its discussion of the merits by stating that

> [T]he controlling issue is whether it is constitutionally permissible to commit Crane as a sexual predator absent a showing that he was unable to control his dangerous behavior. To answer that question, we must revisit *Kansas v. Hendricks*, 521 U.S. 346 (1997).

Pet. App. 5a. The court then opined that "[t]he majority opinion, written by Justice Thomas, controls the result in this case." *Id.*

Looking at the majority opinion in *Hendricks*, the Kansas Supreme Court declared that Justice Thomas's opinion "is replete with references to the commitment of persons who cannot control their own behavior." Pet. App. 6a. The Kansas court then quoted extensively from that opinion, highlighting references to mental disorders that make it "'*difficult, if not impossible, for the person to control his dangerous behavior*'", "'criteria relating to *an individual's inability to control his dangerousness*'", and "'*admitted lack of volitional control*.'" *Id.* at 7a-8a (quoting *Hendricks*, 521 U.S. at 358, 360).

The Kansas Supreme Court then turned to the Kansas Act. The court observed that the Kansas law "does not expressly prohibit confinement absent a finding of uncontrollable dangerousness. In fact, a fair reading of the statute gives the opposite impression." Pet. App. 8a. Noting that the Kansas Act permits commitment when a sex offender's mental abnormality affects "either emotional capacity or volitional capacity," *id.* at 9a, the Court concluded that "the result of the legislature's identifying emotional capacity as well as volitional capacity in the definition of mental abnormality was to include a source of bad behavior other than inability to control behavior." *Id.* The Court further noted that nothing in the Kansas law suggests a requirement that the State prove inability to control behavior when the person's diagnosis is for personality disorder rather than mental abnormality. *Id.*

Thus, concluding that state law does not require proof of inability to control behavior in this context, the Kansas court then turned to Crane's constitutional argument and this Court's decision in *Hendricks*. First, the Kansas court opined that

> *[i]n contrast to this court's* [the Kansas Supreme Court's] *focus on the Act's constitutionality, the Supreme Court's opinion* [in *Hendricks*] *seems to be much more specific to application of the Act to Hendricks*. The particular facts of Hendricks' case, including his conceding that he cannot control his urge to sexually molest children, was at the core of the Supreme Court's opinion.

Pet. App. 10a (emphasis added). Second, the Kansas Supreme asserted that

> [a] fair reading of the majority opinion in *Hendricks* leads us to the inescapable conclusion that commitment under the Act is unconstitutional absent a finding that the defendant cannot control his dangerous behavior. To conclude otherwise would require that we ignore the plain language of the majority opinion in *Hendricks*.

Pet. App. 11a. The Kansas court then once again pointed to language in Justice Thomas's opinion, specifically references to those "'who suffer from a volitional impairment rendering them dangerous beyond their control'", and a mental abnormality or personality disorder that "'makes it difficult, if not impossible,' to control such behavior." *Id.* (quoting *Hendricks*, 521 U.S. at 358).

The Kansas court then opined that, "[h]owever, in the present case, Crane suffers from a 'personality disorder,' which by definition does not include a volitional impairment." Pet. App. 11a-12a. Thus, the Court reversed the commitment order because the jury was not instructed that it had to find Crane had an "inability to control his behavior." *Id.* at 12a.

REASONS FOR GRANTING THE WRIT

In 1997, this Court upheld the Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a01 *et seq.*, against several constitutional challenges. *See Kansas v. Hendricks*, 521 U.S. 346 (1997). Importantly, the Court expressly held that the Act's premises for involuntary civil commitment of certain sex offenders—proof of (1) a "mental abnormality" or personality disorder and (2) dangerousness linked to that mental problem—satisfied substantive due process requirements. *Id.* at 356-60.

Unfortunately, this Court's decision in *Kansas v. Hendricks*, 521 U.S. 346, apparently has not settled all substantive due process challenges to state sexual predator laws, which are involuntary civil commitment acts addressing dangerous, repeat sex offenders. Indeed, after *Hendricks*, sex offenders have argued that this Court created a new substantive due process requirement that the State prove that a particular sex offender has an "utter" or "total" "inability to control his criminal sexual behavior before commitment is permissible. In a related vein, sex offenders subject to these laws also have argued that a personality disorder diagnosis (some of which involve impaired emotional rather than volitional capacity) is an insufficient basis for civil commitment.

In *Kansas v. Hendricks*, Mr. Hendricks suffered from a recognized mental disorder (pedophilia)—not a personality disorder—and Kansas had obtained his commitment on the basis of the statutory provision regarding "mental abnormality", the definition of which expressly includes lack of volitional or emotional capacity. Moreover, as noted in both the majority and dissenting opinions, Hendricks himself, with a 40-year history of pedophilia, admitted that he was unable to control his criminal sexual impulses. *See, e.g.*, 521 U.S. at 360 (majority opinion of Thomas, J.); *id.* at 375-76 (dissenting opinion of Breyer, J.). Nowhere in those opinions, however, does any member of the Court expressly purport to create a new rule of substantive due process that requires the State to prove—as a prerequisite to involuntary civil commitment—that a sexually violent predator has an "utter" or "total" "inability to control" his criminal sexual behavior.

Nonetheless, whether federal substantive due process principles impose such a requirement has now divided the state courts, and the split of authority is deepening. The proper resolution of this issue is of great importance to the States because it will affect the application and effectiveness of numerous state sexually violent predator civil commitment

statutes now in existence, most of which were modeled after the Kansas law following this Court's decision in *Hendricks*. Indeed, the Kansas Supreme Court's holding in this case will effectively eliminate from the statute's reach any sex offender—regardless of past history and likelihood of reoffending—whose primary or sole diagnosis involves impaired emotional rather than volitional capacity. It also will affect those offenders whose diagnoses may involve impaired volitional capacity, but not total impairment. The issue is cleanly presented in this case and merits the Court's immediate attention.

I. WHETHER SUBSTANTIVE DUE PROCESS PRINCIPLES REQUIRE PROOF THAT A SEXUALLY VIOLENT PREDATOR IS UNABLE TO CONTROL HIS CRIMINAL SEXUAL BEHAVIOR IS AN ISSUE THAT HAS DIVIDED THE STATE COURTS.

1. The issue presented in this petition has divided the many state courts that now have considered it. In addition to the Kansas Supreme Court, state appellate courts in at least four other states have expressly addressed the substantive due process issue and have come to different conclusions.

In *In re Linehan*, 594 N.W.2d 867, 875-76 (Minn. 1999), *cert. denied sub nom. Linehan v. Minnesota*, 120 S. Ct. 587 (1999), the Minnesota Supreme Court addressed this issue at some length. Noting that the offender in that case was arguing for an "utter inability to control" requirement, 594 N.W.2d at 872, the court opined that

> [a]t no point in its analysis [in *Hendricks*] did the Supreme Court state that a civil commitment statute aimed at sexually dangerous persons could pass substantive due process without a volitional impairment element. Rather, the Court's reasoning establishes that *some* lack of

volitional control is necessary to narrow the scope of civil commitment statutes.

Id. at 873 (emphasis added).

The majority in *Linehan*, however, chastised the dissent in that case for

> unreasonably narrow[ing] the *Hendricks* holding by inserting the word 'totally' in front of the word 'control' whenever it refers to the Supreme Court's analysis of a person's ability to control his or her sexual impulses. In doing so, the dissent overstates the *Hendricks* holding. *Hendricks* states that a person may be civilly committed if he suffers from a mental abnormality or personality disorder 'that makes [it] difficult, if not impossible, for the person to control his dangerous behavior.' Clearly this language does not requie an utter lack of control over harmful behavior, but rather a lack of adequate control over harmful behavior.

Id. at 873 n.3. Thus, in Minnesota, based on statutory provisions that are indistinguishable from the Kansas law in all material respects, *id.* at 871 ("The language of the Kansas Act is very similar to the language of the Minnesota SDP Act"), the constitutional rule is that the State must prove lack of "adequate control", not that the sex offender "cannot control" his criminal sexual behavior.

To similar effect, see *In re Brooks*, 94 Wash. App. 716, 729, 973 P.2d 486, 492 (1999) (The *Hendricks* "Court did not require, as Mr. Brooks asserts, a showing of a total lack of control. Rather, the person's mental abnormality or personality disorder must make it 'difficult, if not impossible, for the person to control his dangerous behavior'"), *review granted on other issues*, 138 Wash. 2d 1021, 989 P.2d 1136 (1999).

Other state appellate courts have completely rejected an "inability to control" requirement and, instead, have concluded

that *Hendricks* recognizes only two substantive due process requirements: (1) dangerousness, *i.e.*, a likelihood of reoffending, linked to (2) a serious mental problem. In *In re Gordon*, 10 P.3d 500, 503 (Wash. App. 2000), for example, the Court concluded that

> [i]n its analysis, the Court [in *Hendricks*] made clear that civil commitment is appropriate only for individuals whose dangerousness is, to some significant degree, beyond their control, which is determined by linking the dangerousness to the presence of a particular condition, such as a mental abnormality.

10 P.3d at 502. The court observed that, "[l]ike the Kansas statute," Washington's statute "requires the State to prove . . . that a causal link exists between an alleged sexual predator's mental abnormality or personality disorder and the likelihood that he or she will engage in predatory acts of sexual violence in the future." *Id.* at 503. Thus, the Court concluded that the Washington law

> therefore meets the *Hendricks* Court's requirement that civil commitment not be predicated on dangerousness alone. Contrary to Gordon's assertion, *Hendricks* does not require a jury to make a specific finding that the mental abnormality or personality disorder makes it impossible, or at least difficult, for an individual to control his dangerous behavior.

Id. Similarly, in *In re Varner*, 315 Ill. App. 3d 626, 637-38, 734 N.E.2d 226, 235-36 (2000), the court rejected arguments that substantive due process requires the State to prove either that a sex offender "lacks volitional control over his sexual behavior" or that "it was difficult if not impossible for the [offender] to keep himself from offending again."

In *People v. Hatfield*, 80 Cal. Rptr. 268, 282 (1998), *modified* (Dec. 16, 1998), *and review denied and opinion ordered not to be officially published* (Mar. 17, 1999), the

California Court of Appeals strongly rejected the argument that the Kansas Supreme Court accepted in this case, declaring that

> [t]he essence of the due process requirement announced in *Hendricks* is a demonstrated, diagnosed impairment that makes the person likely to engage in dangerous sexually violent behavior in the future. It is the prediction of future dangerousness, whether due to inability to control behavior *or a compelled choice so to act*, that justifies civil commitment.

80 Cal. Rptr. at 282 (emphasis added). Thus, the court refused to impose any substantive due process requirements beyond proof of (1) dangerousness linked to (2) a significant mental problem.

The California Supreme Court appears to have endorsed the same position in *Hubbart v. Superior Court*, 19 Cal. 4th 1138, 969 P.2d 584 (1999). In *Hubbart*, the Court considered the case of a sex offender whose primary diagnosis was of antisocial personality disorder. The California Supreme Court rejected his argument that such a diagnosis was insufficient to satisfy substantive due process requirements. 969 P.2d at 593-99. The Court held that the California law—"which tracks the Kansas scheme verbatim", *id.* at 596—"establishes the requisite connection between impaired volitional control and the danger posed to the public." *Id.* at 597. In essence, the California Supreme Court, like the courts in *Gordon, Varner,* and *Hatfield,* concluded that *Hendricks* recognized only two substantive due process requirements: (1) dangerousness linked to (2) a significant mental problem, the latter of which can be satisfied by a diagnosis of mental abnormality or personality disorder. *Id.* at 593-601.

In contrast to these cases, the Kansas Supreme Court expressly held that proof of utter inability to control criminal sexual behavior is a constitutional requirement. Pet. App. 5a-12a. In so doing, that court was well aware of all the

foregoing decisions (except for *In re Gordon* and *in re Varner* decided in October and August of this year, respectively), and rejected the reasoning of these other courts. There is no way to reconcile or harmonize these decisions, and this important, deepening conflict of authority merits the Court's attention.

2. Imposing a constitutional requirement that the state must prove total lack of volitional control will inappropriately restrict the class of dangerous sex offenders subject to involuntary civil commitment for residential care and treatment. Many violent sex offenders have some ability to control their deviate sexual behavior; they simply choose not to, and in many cases those persons suffer from serious mental problems. The result of the Kansas Supreme Court's constitutional holding will be that many dangerous sex offenders who could benefit from intensive, residential therapy—indeed might be among those most likely to benefit—and who pose a significant danger to the public will simply have to be released from state custody without further treatment.

To the best of Kansas's knowledge, none of the state sex predator civil commitment statutes now in existence require proof that the person is totally unable to control his criminal sexual behavior. Moreover, to the best of Kansas's knowledge, a number of states with such statutes have committed sex offenders whose sole or primary diagnosis is of a personality disorder or antisocial personality. If other state supreme courts follow the Kansas Supreme Court, those commitments will be constitutionally impermissible and those dangerous offenders will have to be released without further treatment. Particularly because many states modeled their sex predator civil commitment statutes on the Kansas law after this Court's *Hendricks* decision, the States need guidance from this Court on the important issue raised here.

II. THIS COURT'S DECISION IN *KANSAS v. HENDRICKS* DID NOT CREATE A NEW "INABILITY TO CONTROL" REQUIREMENT.

The Court's precedents in the involuntary civil commitment context—including its only decision so far addressing sex predator laws, *Kansas v. Hendricks*, 521 U.S. 346 (1997)[1]—repeatedly recognize only two substantive due process requirements for justifying such restraints on liberty. First, there must be proof that the person is dangerous to himself or others. Second, that dangerousness must be linked to a significant mental problem. In *Hendricks*, eight Justices[2] held that the Kansas Sexually Violent Predator Act satisfied those two requirements. The division of opinion within the Court in *Hendricks* was over Hendricks's *ex post facto* challenge, not his substantive due process claims.

In *Hendricks*, neither the majority nor the dissent purported to make lack of volitional control a federal constitutional requirement. There are passing references in the majority opinion to a person's "inability to control" behavior, or "lack of adequate control", 521 U.S. at 357, 358, 362, 364, and in the dissent to "irresistible impulse." *Id.* at 375-76. But the Kansas statute at issue in *Hendricks* did not impose such a requirement, nor do other existing state sex predator statutes do so. Moreover, such a requirement does not fit within the Court's historical approach to determining substantive due process limits on involuntary restraint. Quarantine, for example, could not be justified on the ground that persons being quarantined for contagious diseases generally lack the ability to control their behavior. It was, of course, not surprising that the Court mentioned lack of volitional control in *Hendricks* since the sex offender at issue in that case, Mr.

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[1] The Court has granted review of and heard arguments in a second sex predator case, *Seling v. Young*, No. 99-1185 (argument on October 31, 2000).

[2] Justice Ginsburg does not appear to have joined either the majority or the dissenting opinion on the substantive due process issues in *Hendricks*. *See* 521 U.S. at 373.

Hendricks, had a primary diagnosis of pedophilia (a well-recognized mental disorder), a 40-year history of molesting children, and he admitted that he could not control his deviant impulses.

To the extent the Kansas Supreme Court held that a personality disorder, "by definition", can never never satisfy substantive due process requirements, Pet. App. 11a-12a, that court was simply wrong. The American Psychiatric Association recognizes that "no definition adequately specifies precise boundaries for the concept of 'mental disorder.' The concept of mental disorder, like many other concepts in medicine and science, lacks a consistent operational definition that covers all situations." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* at xxi (4th ed. 1994) ("DSM-IV"). Indeed, the psychiatrists caution that there may be an "imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." *Id.* at xxiii. To be sure, a "mental disorder" or "personality disorder" diagnosis does not alone necessarily

> imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability. The clinicial and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency.

Id. at xxvii. But that is why the Court in *Hendricks* reiterated that substantive due process requires that there be a finding of dangerousness linked to the person's mental problems.

Some personality disorders may well justify involuntary civil commitment for residential care and treatment under this Court's decision in *Hendricks*. Indeed, the American Psychiatric Association states that "[a] Personality Disorder is

an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress *or impairment.*" DSM-IV, at 629 (emphasis added). Recognized personality disorders include Paranoid Personality Disorder, Schizoid Personality Disorder, Schizotypal Personality Disorder, Antisocial Personality Disorder (Crane's diagnosis in this case), Borderline Personality Disorder, Histrionic Personality Disorder, Narcissistic Personality Disorder, Avoidant Personality Disorder, Dependent Personality Disorder, Obsessive-Compulsive Personality Disorder, and Personality Disorder Not Otherwise Specified. *Id.*

Several personality disorders are characterized by impulsiveness, including Antisocial Personality Disorder, but several of them would not necessarily involve a total inability to control criminal sexual behavior. *See* DSM-IV, at 629-73. Thus, the Kansas Supreme Court's holding in this case may preclude the commitment of some dangerous sex offenders with serious, diagnosed personality disorders. For example, the diagnosis for Crane in this case—Antisocial Personality Disorder—has an "essential feature" of "a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood." *Id.* at 645. Moreover, DSM-IV's extensive description of this disorder indicates that such a diagnosis is very serious and often applies to a person who poses substantial risks of engaging in criminal acts that will harm others. For example, persons with this diagnosis "fail to conform to social norms with respect to lawful behavior," "may repeatedly perform acts that are grounds for arrest," "disregard the wishes, rights, or feelings of others," "are frequently deceitful and manipulative," "may repeatedly lie," "tend to be irritable and aggressive," and "may blame the victims for being foolish, helpless, or deserving their fate," among other endearing traits. *Id.* at 646.

Nor is this a common diagnosis among the American population. DSM-IV indicates that the prevalence of Antisocial Personality Disorder "is about 3% in males and about 1% in females." DSM-IV, at 648.

This Court's decision in *Kansas v. Hendricks* established that proof of dangerousness (of which there is no real question in this case) linked to a serious mental problem (such as Crane's diagnosis of Antisocial Personality Disorder) satisfies constitutional requirements in this context. The Kansas Supreme Court simply read too much into this Court's decision. *Hendricks*, of course, reversed the Kansas Supreme Court's earlier decision invalidating the Kansas law on substantive due process grounds similar to those upon which the Kansas court once again seized in this case.

A fair reading of *Hendricks* demonstrates that this Court did not create a new substantive due process "inability to control" requirement. At most, the Court's references to lack of volitional control reflect the facts and circumstances of the case that was before the Court.

CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court grant this petition for a writ of *certiorari* in order to resolve a deepening split of authority in the state courts.

Respectfully submitted,

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December 2000

ADDENDUM

SUPREME COURT ORDER

DISTRICT CASE NO. 97C16409

IN THE SUPREME COURT
OF THE STATE OF KANSAS

DISTRICT ATTORNEY JOHNSON COUNTY
JOHNSON COUNTY COURTHOUSE
PO BOX 728
OLATHE KS 66061

IN THE MATTER OF THE
CARE AND TREATMENT OF NO. 98-82080-AS
MICHAEL TODD CRANE

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING OR MODIFICATION
BY STATE OF KANSAS.
CONSIDERED BY THE COURT AND DENIED.
Response noted.

DATE: 09/26/2000.

CAROL G. GREEN
CLERK

Supreme Court of Kansas.

In the Matter of the Care and Treatment of Michael T. Crane, Appellant.

No. 82,080.

July 14, 2000.

Syllabus by the Court

1. A commitment under the Sexually Violent Predator Act, K.S.A. 59-29a01 *et seq.*, is unconstitutional absent a finding that a defendant suffers from a volitional impairment rendering him or her dangerous beyond his or her control.

2. In an appeal from an order committing the defendant to custody under K.S.A. 59-29a01 *et seq.*, the record is examined, and it is held the district court committed reversible error in (1) ruling that the State is not required to prove the defendant suffers from a volitional impairment and (2) instructing the jury.

ALLEGRUCCI, J.:

Michael T. Crane appeals from the district court's order committing him to custody under the Sexually Violent Predator Act, K.S.A. 59-29a01 *et seq.* (Act).

In *State v. Crane*, 260 Kan. 208, 918 P.2d 1256 (1996), this court affirmed Michael Crane's conviction of lewd and lascivious behavior for exposing himself to a tanning salon attendant on January 6, 1993. His convictions of attempted aggravated criminal sodomy, attempted rape, and kidnapping were reversed. They arose out of an incident in a video store that took place approximately 30 minutes after the tanning salon incident.

The aggravated sexual battery conviction that supplied the prior conduct element of Crane's sexual predator determination arose out of the video store incident. In that instance, Crane

waited until he was the only customer in a video store and then grabbed the clerk from behind. With his genitals exposed, he lifted and pushed her and squeezed her neck with his hands. Crane three times ordered her to perform oral sex and said he was going to rape her. The attack ended when Crane suddenly stopped and ran out of the store.

Although the kidnapping charge could not be renewed, other charges arising from this incident were refiled. Pursuant to a plea agreement, Crane pled guilty to one count of aggravated sexual battery, a class D felony.

The present action was initiated when the State filed a petition in the district court seeking to have Crane evaluated and adjudicated a sexually violent predator. At the commitment trial, the State presented evidence of Crane's inappropriate sexual behavior on several occasions as well as the testimony of mental health professionals.

Psychologist Douglas Hippe evaluated Crane in 1994 and reviewed the mental health records subsequently compiled for Crane. He concluded that Crane suffers from antisocial personality disorder. Of the seven criteria listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) (DSM-IV) for antisocial personality disorder, Crane consistently exhibits six, in Hippe's view. Crane also suffers from exhibitionism, which is a separate disorder. According to Hippe, exhibitionism alone would not be a sufficient basis for finding that a person was a sexual predator. Crane, in his opinion, is a sexual predator due to his combination of antisocial personality disorder and exhibitionism. He cited the increasing frequency of incidents involving Crane, increasing intensity of the incidents, Crane's increasing disregard for the rights of others, and his increasing daring and aggressiveness.

Psychologist Robert Huerter tested and interviewed Crane in 1993 with regard to Crane's claiming to have been in a

blackout state during the video store incident. He concluded that Crane had not experienced blackout.

Psychiatrist Leonardo Mabugat testified that Crane suffers from antisocial personality disorder, "a pervasive pattern of disregard for and violation of the rights of others," which usually starts in or around adolescence.

The victim of the video store incident testified that the prosecuting attorney had talked with her about the State's entering into a plea agreement with Crane. The victim had been upset because she did not think that Crane would be serving enough time.

At the commitment trial, the victim expressed her disappointment in the course Crane's prosecution had taken. The prosecutor drew out her dissatisfaction by asking, "So would it be fair to say that for a crime that this Court gave a 35-to-life sentence to Mr. Crane, he only served a little over four years?" And he followed up on her affirmative response with "[a]nd understandably you're very upset about how the system treated you in this case, right?" "Yes, very," she answered. The victim had been told by the State that the kidnapping charge could not be refiled against Crane on account of a technicality.

In this regard, the prosecutor had suggested to her that obtaining a guilty plea "was the best way to go in order to be able to go down the line" and use the option of the Act. The victim agreed to the plea bargain because she believed "it was the only way to make sure that it didn't end there." The victim testified, "I was not aware that there was an option of going to trial and going through this or agreeing to the plea and then using the Sexual Predator Act. As I was—as I understood, this was the only option, but if we can get a—some kind of a conviction, then we can use this option later down the road to make sure he stays off the street."

Crane raises several issues on appeal; however, the controlling issue is whether it is constitutionally permissible to commit Crane as a sexual predator absent a showing that he was unable to control his dangerous behavior. To answer that question, we must revisit *Kansas v. Hendricks*, 521 U.S. 346, 138 L. Ed. 2d 501, 117 S. Ct. 2072 (1997). The majority opinion, written by Justice Thomas, controls the result in this case. Crane contends that the trial court erred in ruling that the Supreme Court's holding in *Hendricks* does not require a showing of a volitional impairment that prevents him from controlling his dangerous behavior when the respondent's mental disorder is a personality disorder. In its journal entry of the various stages in this proceeding, the district court ruled on February 25, 1998:

> "Respondent mixes legal and psychiatric terms. The Court finds the commission of a sexual crime and the existence of a mental abnormality or personality disorder which makes the person likely to engage in future predatory acts of violence are separate concepts and not interdependent upon one another in the sexually violent predator context. The Court denies Respondent's Motion for Summary judgment stating as a matter of law that Respondent misinterprets the holding of *Kansas v. Hendricks*, 117 S.Ct. 2072 (1997) by arguing the State must prove the existence of a mental disorder that so impairs the volitional control of Respondent as to render him unable to control his dangerous behavior. The Court holds the State must only prove the existence of a mental disorder that makes Respondent likely to reoffend."

On August 3, 1998, the district court held as a matter of law "that even though the State's expert witnesses might agree that Respondent's mental disorder does not impair his volitional control to the degree he cannot control his dangerous behavior, that K.S.A. 59-29a01 *et seq.* does not specify such a required element to be proven."

Accordingly, the jury was instructed that in order to establish that Crane is a sexually violent predator, the State had to prove (1) that Crane had been convicted of aggravated sexual battery and (2) that he "suffers from a mental abnormality or personality disorder which makes the respondent likely to engage in future predatory acts of sexual violence, if not confined in a secure facility." "Likely" was defined as "more probable to occur than not to occur." "Mental abnormality" was defined for the jury in accordance with K.S.A.1999 Supp. 59-29a02(b) as a "condition affecting the emotional or volitional capacity which predisposes a person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." "Personality disorder" was defined for the jury as a "condition recognized by the ... [DSM IV], and includes antisocial personality disorder."

Crane argues that *Hendricks* states in clear, unambiguous language that the constitutionality of the commitment procedure created by the Act depends on its application being limited to persons who cannot control their dangerous behavior. He quotes a number of passages from the majority opinion in *Hendricks* that bear on the respondent's inability to control his or her conduct. There is no question that the majority opinion is replete with references to the commitment of persons who cannot control their own behavior. See, *e.g.*, 521 U.S. at 357, 358, 360, 362, and 364.

Hendricks admitted that he had repeatedly sexually abused children and that he was unable to control the urge to do so. 521 U.S. at 355, 360. On appeal from his commitment proceeding, this court invalidated the Act on the ground that it did not predicate commitment on a finding of mental illness, which was a requirement of substantive due process. *In re Care & Treatment of Hendricks*, 259 Kan. 246, 912 P.2d 129 (1996). The Supreme Court granted certiorari on the State's petition to consider the due process issue as well as on

Hendricks's cross-petition to consider his federal ex post facto and double jeopardy claims. 521 U.S. at 350.

On the question of due process, the Supreme Court rejected this court's requiring a finding of mental illness in order to override an individual's constitutionally protected liberty interest. 521 U.S. at 356-60. The Supreme Court catalogued constitutionally permissible instances in which "States have in certain narrow circumstances provided for the forcible civil detainment of people who are *unable to control their behavior* and who thereby pose a danger to the public health and safety." (Emphasis added.) 521 U.S. at 357. The typical state statute's linking of a finding of dangerousness with an additional factor, such as mental illness, is noted, as is the Kansas Act's conformance to the pattern:

> "These added statutory requirements serve to limit involuntary civil confinement to those *who suffer from a volitional impairment rendering them dangerous beyond their control*. The Kansas Act is plainly of a kind with these other civil commitment statutes: It requires a finding of future dangerousness, and then links that finding to the existence of a 'mental abnormality' or 'personality disorder' that makes *it difficult, if not impossible, for the person to control his dangerous behavior*. Kan. Stat. Ann. § 59-29a02(b) (1994). The precommitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to *those who are unable to control their dangerousness*." (Emphasis added.) 521 U.S. at 358.

The Supreme Court concluded:

> "To the extend that the civil commitment statutes we have considered set forth criteria relating to *an individual's inability to control his dangerousness*, the Kansas Act

> sets forth comparable criteria and Hendricks' condition doubtless satisfies those criteria.... Hendricks even conceded that, when he becomes 'stressed out,' he cannot 'control the urge' to molest children.... *This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.* Hendricks' diagnosis as a pedophile, which qualifies as a 'mental abnormality' under the Act, thus plainly suffices for due process purposes." (Emphasis added.) 521 U.S. at 360.

Kansas' statutory scheme for commitment of sexually violent predators does not expressly prohibit confinement absent a finding of uncontrollable dangerousness. In fact, a fair reading of the statute gives the opposite impression.

The Act provides for commitment of persons determined to be sexually violent predators. A "sexually violent predator" is defined in the statute as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence." K.S.A.1999 Supp. 59-29a02(a). "Mental abnormality" is defined as a "condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." K.S.A.1999 Supp. 59-29a02(b). The phrase "likely to engage in repeat acts of sexual violence" "means the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." K.S.A.1999 Supp. 59-29a02(c).

The legislature specified that a person subject to commitment, in addition to having some history of a sexual offense or offenses, must be likely to engage in future, dangerous sexual behavior on account of a mental condition.

With regard to the mental condition, the legislature provided that it could affect either emotional capacity or volitional capacity. Volitional capacity is the capacity to exercise choice or will; a condition affecting the capacity to exercise choice or will in this context would be one that adversely affected the capacity, thereby rendering the person unable to control his or her behavior. The legislature identified emotional capacity as an alternative faculty that could be affected by the condition. Logic would seem to dictate that the alternative to a capacity involving the exercise of will is one in which the exercise of will is not at issue. Thus, a condition affecting that faculty would not necessarily remove the person's ability to control his or her behavior. It seems, therefore, that the result of the legislature's identifying emotional capacity as well as volitional capacity in the definition of mental abnormality was to include a source of bad behavior other than inability to control behavior.

The legislature also provided an alternative to a mental abnormality and that is a personality disorder. However, there is no definition of personality disorder in the Act. Thus, there is no express requirement of a finding of inability to control behavior in a personality disorder. Nor is there anything implied by the absence of a definition of personality disorder that would inject the requirement.

There also is no pattern definition of personality disorder. The Notes on Use of PIK Crim.3d 57.41 state that a pattern definition is not possible because there are too many conditions recognized by the American Psychiatric Association as constituting personality disorders. "Notwithstanding, the Committee does recommend that the trial judge fashion an appropriate definitional instruction based upon the specific diagnosis stated in the American Psychiatric Association manual." In the present case, the trial judge instructed the jury that "personality disorder" is a "condition recognized by the ... [DSM IV], and includes antisocial personality disorder."

At trial, Dr. Mabugat testified for the State that Crane suffered from the mental abnormality of exhibitionism and from the personality disorder called antisocial personality disorder. With respect to antisocial personality disorder, Dr. Mabugat testified that Crane displayed a pervasive pattern of disregard for and violation of the rights of others that included the following behavior:

> failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; impulsivity or failure to plan ahead;
>
> irritability and aggressiveness, as indicated by repeated physical fights or assaults.

Dr. Mabugat believed that Crane's behavior was a combination of willful and uncontrollable behavior. Thus, if a volitional impairment were required for commitment under the Act, there was evidence of some inability on Crane's part to control his behavior.

Crane argues that *Hendricks* requires a volitional impairment when the person's mental condition is a personality disorder rather than a mental abnormality. Stated more generally, Crane's understanding is that the Supreme Court read a volitional impairment requirement into the Act as a condition of its constitutionality. In contrast to this court's focus on the Act's constitutionality, the Supreme Court's opinion seems to be much more specific to application of the Act to Hendricks. The particular facts of Hendricks' case, including his conceding that he cannot control his urge to sexually molest children, was at the core of the Supreme Court's opinion.

Finally, Crane directs the court's attention to a concern expressed by Justice Kennedy in his concurring opinion. After stating that the Kansas Act as applied to Hendricks conformed to Supreme Court precedents, he cautioned that "if it were shown that mental abnormality is too imprecise a category to

offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." 521 U.S. at 373. Crane argues that antisocial personality disorder is too imprecise a basis for civil confinement. He notes that in a deposition, Dr. Mabugat estimated that probably more than 75% of prison inmates suffer from antisocial personality disorder.

In summary, the Supreme Court opinion in *Hendricks* does not seem to include consideration of willful behavior. The Act's definition of mental abnormality seems to include behavior that the respondent could control, and the Act is silent with regard to personality disorder. Crane's position is that the Supreme Court read a requirement of inability to control behavior into the Act in order to uphold its constitutionality. Thus, he argues that the Act cannot be applied to him in the absence of a finding that he was unable to control his behavior. We find merit in the defendant's argument.

A fair reading of the majority opinion in *Hendricks* leads us to the inescapable conclusion that commitment under the Act is unconstitutional absent a finding that the defendant cannot control his dangerous behavior. To conclude otherwise would require that we ignore the plain language of the majority opinion in *Hendricks*. Justice Thomas, speaking for the majority, stated that to be constitutional, a civil commitment must limit involuntary confinement to those "who suffer from a volitional impairment rendering them dangerous beyond their control." 521 U.S. at 358. He noted that the Kansas Act set forth criteria to make such a finding by linking future dangerousness to a "mental abnormality" or "personality disorder" that "makes it difficult, if not impossible," to control such behavior. 521 U.S. at 358. Hendricks met that criteria by being diagnosed as a pedophile as well as admitting that he could not control his urge to molest children.

However, in the present case, Crane suffers from a "personality disorder," which by definition does not include a

volitional impairment. As noted, there was some evidence to that effect. Within the standard of proof beyond a reasonable doubt, however, such evidence does not seem adequate. K.S.A.1999 Supp. 59-29a07(a). Its sufficiency is a question for the jury, which was not instructed to make a finding as to Crane's inability to control his behavior. Since we hold that such a finding is required, the failure to so instruct the jury was error and requires that we reverse and remand for a new trial.

Crane also argues that the State's application of the Act violates the constitutional prohibitions of ex post facto laws and double jeopardy. The element of inability to control behavior also figures in the Supreme Court's consideration of Hendricks' ex post facto and double jeopardy claims. There, it is a part of the reasoning that supports the conclusion that the Kansas Act establishes civil rather than criminal proceedings. 521 U.S. at 360-69. Because the Ex Post Facto and Double Jeopardy Clauses pertain exclusively to penal statutes, the Supreme Court concluded that the Kansas Act "runs afoul" of neither. 521 U.S. at 371.

The Supreme Court's rationale regarding the nonpunitive nature of the Kansas Act was twofold. First, commitment under the Act does not implicate objectives of criminal punishment, such as deterrence. 521 U.S. at 361-62. In that regard, the Court stated: "Those persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that *prevents them from exercising adequate control over their behavior*. Such persons are therefore unlikely to be deterred by the threat of confinement." (Emphasis added.) 521 U.S. at 362-63. Second, contrary to Hendricks' contention, the indefinite duration of confinement under the Act is not evidence of the State's punitive intent. The indefinite duration of confinement was said instead to be linked to the indeterminate suitability for release. 521 U.S. at 363-64. In addition, the periodic reviews required by the Act of the person's condition demonstrated to the Court "that

Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality rendering him *unable to control his dangerousness*." (Emphasis added.) 521 U.S. at 364.

The Ex Post Facto Clause forbids inflicting punishment greater than that attached to the offense when it was committed. U.S. Const., Art. I, § 10; *State v. LaMunyon*, 259 Kan. 54, Syl. ¶ 5, 911 P.2d 151 (1996). Hendricks, like Crane, committed the sexual offenses in question before the Act became effective. The double jeopardy and ex post facto claims were rejected by the Supreme Court majority on the ground that the Act is nonpunitive. 521 U.S. at 369. As we have seen, Hendricks' admitted inability to control his behavior figured heavily in the Supreme Court's classifying the Act as nonpunitive. First, Hendricks and persons like him would not be deterred by the commitment proceeding because uncontrollable behavior is not deterrable. 521 U.S. at 362. Second, Hendricks and persons like him would be confined only as long as they were unable to control their behavior. 521 U.S. at 364. Crane contends that this does not end the inquiry because the determination whether punishment is being imposed is factual so that it may vary from case to case. His view is supported by the dissenting opinion in *Hendricks* and, perhaps more importantly, by the concurring opinion of Justice Kennedy. With five justices agreeing that factual circumstances different from those of Hendricks might warrant independent consideration of an ex post facto claim, the question is open whether the trial court was justified in concluding that the Supreme Court had foreclosed further consideration of the issue.

Justice Kennedy, writing about the majority opinion, stated that it fully explains why an ex post facto challenge could not succeed with regard to Hendricks. He continued:

> "All this, however, concerns Hendricks alone. My brief, further comment is to caution against dangers

inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retroactive application.

"... As all Members of the Court seem to agree, ... the power of the State to confine persons who, by reason of a mental disease or mental abnormality, constitute a real, continuing, and serious danger to society is well established. [Citation omitted.] Confinement of such individuals is permitted even if it is pursuant to a statute enacted after the crime has been committed and the offender has begun serving, or has all but completed serving, a penal sentence, provided there is no object or purpose to punish. [Citation omitted.] The Kansas law, with its attendant protections ... is within this pattern and tradition of civil confinement....

"Notwithstanding its civil attributes, the practical effect of the Kansas law may be to impose confinement for life....

"A common response to this may be, 'A life term is exactly what the sentence should have been anyway,' or, in the words of a Kansas task force member, 'SO BE IT.' [Citation omitted.] The point, however, is not how long Hendricks and others like him should serve a criminal sentence. With his criminal record, after all, a life term may well have been the only sentence appropriate to protect society and vindicate the wrong. The concern instead is whether it is the criminal system or the civil system which should make the decision in the first place. *If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function*....

"On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil

confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." (Emphasis added.) 521 U.S. at 371-73.

Justice Kennedy's concerns seem to have anticipated the case now before this court. Crane's convictions of kidnapping, attempted aggravated sodomy, and attempted rape arising from an incident involving a video store clerk were reversed by this court. 260 Kan. 208. The State refiled charges of attempted aggravated sodomy and attempted rape. Then the State and Crane entered into an agreement that concluded the criminal matter with his entering a plea of guilty to the single offense of aggravated sexual battery. He pled guilty in August 1997, and his conditional release date was January 6, 1998. The victim's testimony at Crane's sexual predator trial revealed that the State told her of its intention to follow Crane's plea with a sexual predator petition in order to prolong his confinement. This typifies the problem foreseen by Justice Kennedy when he wrote of "dangers inherent when a civil confinement law is used in conjunction with the criminal process." 521 U.S. at 371-72. This case even reflects the circumstances postulated by Justice Kennedy to illustrate how the conjunction of civil confinement and criminal proceedings could go wrong—the use of civil proceedings to restore confinement time shortened by a plea bargain. Where this case deviates from the scene sketched by Justice Kennedy is that the plea agreement in this case, rather than being improvident, arose on account of Crane's already having served nearly as much time as could be imposed for his conduct.

Crane presents forceful arguments that the application of the Act in his circumstances has punitive features. Crane, unlike Hendricks, did not admit that his sexual behavior was on account of an irresistible urge. Nor was there a finding that

Crane is unable to control his behavior. Application of the Act in this case parallels circumstances Justice Kennedy cautioned against. However, we can only surmise whether Justice Kennedy would find the State has crossed the line from civil commitment to criminal punishment in the present case. As we previously noted, this case does not arise out of an improvident plea bargain. Here, the State's primary motive for filing the petition was not to obtain treatment for the defendant. However, so long as the State has an evidentiary basis for filing the petition, its motive should not render the resulting judgment and commitment of the defendant to be punitive.

We note that in *In re Care & Treatment of Hay*, 263 Kan. 822, 830-31, 953 P.2d 666 (1998), this court stated that Hay's ex post facto challenge was shattered by the Supreme Court's holding that the Act created a civil rather than criminal proceeding. In a syllabus paragraph, the court declared that commitment under the Act was not criminal or punitive and, therefore, does not violate the prohibition of ex post facto lawmaking. 263 Kan. 822, Syl. ¶ 2.

We will address the remaining issues raised by Crane, as they may again be raised in the district court on remand. Crane argues that the evidence of prior sexual conduct should not have been admitted into evidence when he had agreed to stipulate to the convictions.

The State was required to prove two elements—(1) that Crane had been charged with or convicted of a sexually violent offense and (2) that he suffers from a mental abnormality or personality disorder that makes him likely to engage in repeat acts of sexual violence. K.S.A.1999 Supp. 59-29a02(a). Accordingly, the jury was instructed as follows:

> "The State alleges the respondent is a sexually violent predator. The respondent denies the allegation.
>
> "To establish this charge, each of the following claims must be proved:

> 1. That the respondent has been convicted of Aggravated Sexual Battery, a sexually violent offense; and
>
> 2. That the respondent suffers from a mental abnormality or personality disorder which makes the respondent likely to engage in future predatory acts of sexual violence, if not confined in a secure facility."

Crane offered to stipulate with regard to his status as a convicted sexual offender. The State declined to stipulate. The State argues that evidence of offenses other than the conviction specified in the first element is relevant to the second element because mental health experts base predictions of future sexual behavior on past sexual behavior.

The district court permitted the State to decline to stipulate and to call a number of witnesses who testified about past instances of Crane's sexual behavior. The statement of facts in the State's brief on appeal recounts the testimony of 11 "behavior" witnesses. Most of them testified about incidents that were not subject to proof. That is, most of them testified about incidents other than the aggravated sexual battery that was the basis for the conviction the jury was required to find.

In *Hay*, the respondent complained about the admission of uncharged conduct. The court made short work of Hay's position: "The critical issues in a sexual predator case make the evidence of prior conduct, charged or uncharged, material evidence in the case. We hold the prohibitions of K.S.A. 60-455 are not applicable or governing in a case of this nature." 263 Kan. at 838. Hay challenged the admission of evidence of specific conduct. The court said it

> "was clearly relevant to prove he suffers from the condition of pedophilia and that he is likely to engage in predatory acts of sexual violence in the future. We are hard-pressed to see how such evidence can be prohibited by K.S.A. 60-455 when it is an essential element of the

required proof and necessary for the decision-making process of the jury." 263 Kan. at 837.

In this case, Crane argues that K.S.A. 60-447 should be effective where 60-455 was not, and he relies on *State v. Lee*, 266 Kan. 804, 977 P.2d 263 (1999), to give effect to his offer to stipulate to conviction of aggravated sexual battery. K.S.A. 60-447 excludes evidence of specific instances of conduct, other than evidence of conviction of a crime, as proof of a character trait. *Gardner v. Pereboom*, 197 Kan. 188, 416 P.2d 67 (1966). Because most, if not all, of the complained-of evidence was evidence of conviction of crimes, it would not have been excluded by K.S.A. 60-447. Crane's reliance on *Lee* also lacks merit. In that case, the court held that a criminal defendant's request to stipulate that he or she is a convicted felon must be honored and that the stipulation will satisfy the State's burden of proving the convicted felon element of the crime of criminal possession of a firearm. 266 Kan. 804, Syl. ¶ 4. The application of *Lee*, a criminal proceeding, to the present proceeding is questionable due to the criminal/civil dichotomy. However, we need not answer that question. In *Lee*, the court cautioned: "Our views should not be read as limiting the State in presenting a full in-depth story of a prior crime when the prior crime has relevance independent of merely proving prior felony status for K.S.A. 21-4204(a)(4) [possession of a firearm by a convicted felon]." 266 Kan. at 816. This court held in *Hay* that the evidence of prior conduct was material to the question of likelihood that the respondent would engage in repeat conduct as well as to the element of conviction of prior conduct. Thus, the court's holding in *Lee* does not apply in this sexual predator proceeding.

Crane next argues that the State's failure to personally serve him deprived the district court of jurisdiction. Crane contends that the Act is a subpart of the Care and Treatment Act for Mentally Ill Persons (CTAMIP), K.S.A.1999 Supp. 59-2945 *et seq*. He would have the court regard the provision for

notice to proposed patients within the CTAMIP as an umbrella provision extending to the Act. His construct does not withstand examination of the statutes. Both Acts are in the Probate Code, Chapter 59. They do not occupy the same article, however. The CTAMIP constitutes Article 29 of Chapter; the Act constitutes Article 29a. The Articles have different names, different definitions, and different functions. Without an express reference in the Act to the notice provision of CTAMIP, there is no basis for believing that it applies equally under both.

Finally, Crane argues that the timing of the State's petition against him did not comply with statutory requirements. The State filed a sexual predator petition against Crane on December 11, 1997. He was released on parole on January 6, 1998. Crane contends that as a consequence of the State's failing to serve him personally with notice, the action was not commenced against him before his conditional release. As discussed in the preceding paragraph, with no personal service requirement in the Act, there is no basis for Crane's contention in that regard.

With respect to the timing of the petition, there is nothing in the record to suggest that it was improper under the version of K.S.A. 59-29a04 that was effective at the time of Crane's release. K.S.A.1997 Supp. 59-29a04 provided for a petition to be filed by the attorney general within 75 days of receiving written notice that Crane's release was scheduled. K.S.A.1997 Supp. 59-29a03(a)(1) required the Department of Corrections to give notice 90 days prior to Crane's anticipated release.

It may be noted that in 1999 the legislature added the following proviso to 59-29a04: "The provisions of this section are not jurisdictional, and failure to comply with such provisions in no way prevents the attorney general from proceeding against a person otherwise subject to the provision of K.S.A. 59-29a01 *et seq*., and amendments thereto." K.S.A. 1999 Supp. 59-29a04(b).

The judgment of the district court is reversed, and the case is remanded for a new trial.

IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT

IN THE MATTER OF THE CARE AND TREATMENT OF MICHAEL TODD CRANE

Case No. 97C16409
Court No. 1

JOURNAL ENTRY

Now on the 28th day of January, 1998, the above matter comes on for a Probable Cause hearing before the Honorable Peter V. Ruddick, Judge of the District Court of Johnson County, Kansas. The State appears by Special Assistant Attorney Generals W. Scott Toth and Brenda Cameron. Respondent appears in person and in custody and with court appointed counsel John C. Donham. Respondent argues the Court is without subject matter or personal jurisdiction as the State has not served him personally with a copy of the Petition or a summons as required by Civil Rules of Procedure. The Court finds as a matter of law that K.S.A. 59-29a01, et seq does not contain a provision requiring personal service on the proposed patient and denies Respondent's motion to dismiss the proceeding. Respondent argues the State did not follow the statutory procedure contained within K.S.A. 59-29a01, et seq for initiating an involuntary commitment proceeding because it chose instead to release Respondent on parole. The Court takes this motion under advisement to give both parties an opportunity to brief their positions. Respondent argues that this proceeding represents an *ex post facto* application of a punitive measure and subjects him to double jeopardy. The Court makes a finding that as a matter of law, the issues of *ex post facto* and double jeopardy and the prohibition as to either under the Constitutions of the State of Kansas and the United States are controlled by the U.S. Supreme Court decision in Kansas v. Hendricks, 117 S.Ct. 2072 (1997) and denies Respondent's motion to dismiss the proceeding. Respondent argues that the use of prior criminal convictions by the State to

prove he is a sexual predator is barred by the principle of *res judicata* and/or collateral estopple in that the State is now seeking to prove the existence of a mental abnormality or personality disorder that impairs Respondent's volitional control to the degree that he cannot control his dangerous behavior. To enter a finding of Guilty to a criminal offense, a prior Court of competent jurisdiction would have necessarily found Respondent acted knowingly, willfully and purposefully in committing the prior crime. The Court finds that as a matter of law, the State is only required to prove Respondent's mental disorder makes him likely to reoffend and denies his motion to prohibit the State from using evidence of his prior convictions. Respondent argues that his involuntary commitment proceeding should be closed to the general public to prevent disclosure of confidential information to the public by the press. The Court finds as a matter of law that K.S.A. 59-29a01, et seq contains no provision on this issue and denies his motion. The State presents evidence and rests. Respondent presents no evidence. The Court finds there is probable cause to believe Respondent is a sexual predator as that term is defined in K.S.A. 59-29a01 et seq and orders Respondent transported to Larned State Hospital for an evaluation pursuant to K.S.A. 59-29a01 et seq.

Now on this 25th day of February, 1998, the above matter comes on for hearing on Respondent's motions before the Honorable Peter V. Ruddick. The State appears by W. Scott Toth and Brenda Cameron. Respondent appears by and through counsel John C. Donham. Respondent argues again that use of prior criminal convictions to prove the existence of a mental disorder impairing his volitional control to the degree he cannot control his dangerous behavior constitutes the seeking of a diametrically opposed result reached by a prior Court that found his conduct wilful, purposeful and not by accident. The Court finds that the principle of *res judicata* does not bar the State from introducing evidence of Respondent's prior criminal convictions as "mental

abnormality" and "personality disorder" are psychiatric terms whereas "criminal intent" is a legal term and the two are independent concepts. The proof of one does not rule out the existence of the other. The Court denies Respondent's motion to prohibit the State from using evidence of his prior criminal convictions. Respondent also argues that he should be granted summary judgment in this matter as the State has no evidence he committed any sexual act while his volitional control was impaired by any mental disorder to the degree he was unable to control his dangerous behavior. The Court finds that while the facts stated in Respondent's motion are uncontroverted, as a matter of law Respondent mixes legal and psychiatric terms. The Court finds the commission of a sexual crime and the existence of a mental abnormality or personality disorder which makes the person likely to engage in future predatory acts of violence are separate concepts and not interindependent upon one another in the sexually violent predator context. The Court denies Respondent's Motion for Summary Judgment stating as a matter of law that Respondent misinterprets the holding of Kansas v. Hendricks, 117 S.Ct. 2072 (1997) by arguing the State must prove the existence of a mental disorder that so impairs the volitional control of Respondent as to render him unable to control his dangerous behavior. The Court holds the State must only prove the existence of a mental disorder that makes Respondent likely to reoffend.

Now on this 13th day of May, 1998, the above matter comes on for hearing on Respondent's motion to dismiss on constitutional grounds before the Honorable Peter V. Ruddick. The State appears by W. Scott Toth and Brenda Cameron. Respondent appears personally, in custody and with counsel, John C. Donham. The Court denies Respondent's motion finding as a matter of law that the State did not deny Respondent due process of law by withholding sex offender treatment until Respondent completed his prison sentence. The Court notes that Respondent's argument that structuring his treatment program so as to run consecutive to his prison

sentence rather than concurrent with it as evidence of a punitive purpose has been settled by the decision in Kansas v. Hendricks, 117 S.Ct. 2072 (1997). The Court finds as a matter of law that Respondent is not subjected to double jeopardy, *ex post facto* application of law or denial of due process. The Court next takes up Respondent's Motion for Summary Judgment and denies same finding as a matter of law that Respondent's argument is really one of interpretation of the Sexual Predator Act and not one driven by uncontroverted facts. The Court rules that the release of Respondent by the State on parole after the State filed its Petition but before it served Respondent with notice of the involuntary commitment proceeding does not bar the State from proceeding in this matter and, further, that personal service on Respondent is not required.

Now on this 3rd day of August, 1998, the above matter comes on for hearing before the Honorable Peter V. Ruddick on Respondent's motion for summary judgment. The Court makes a factual finding that the State has controverted one or more facts. As a matter of law, the Court further finds that even though the State's expert witnesses might agree that Respondent's mental disorder does not impair his volitional control to the degree he cannot control his dangerous behavior, that K.S.A. 59-29a01 et seq does not specify such a required element to be proven. The Court denies Respondent's motion for summary judgment. The Court also denies Respondent's motion to exclude testimony from Respondent's victims as to his specific conduct pursuant to K.S.A. 60-447.

Now on this 10th day of August, 1998, the above matter comes on for trial in the District Court of Johnson County, Kansas before the Honorable Peter V. Ruddick. The State appears by W. Scott Toth and Brenda Cameron, Special Assistant Attorney Generals. The Respondent appears in person and with counsel, John C. Donham. Respondent argues pretrial that the relitigation of his prior offenses through the

testimony of witnesses constitutes successive prosecution and double jeopardy. The Court denies his motion to dismiss on those grounds finding as a matter of law that under Hendricks, such testimony is accepted. Respondent renews all of his prior pretrial motions and argues additional motions. The Court denies them and grants Respondent's request for a continuing objection to all adverse rulings on his pretrial motions. A jury of 12 plus 2 alternates is selected and sworn. The State presents evidence and rests. Respondent moves for a directed verdict arguing no evidence Respondent's volitional control is impaired. The Court denies the motion. Respondent offers no evidence. Over Respondent's objection, the jury is not instructed that the State must prove Respondent suffers a mental disorder that impairs his volitional control to the degree he cannot control his dangerous behavior. The jury returns a unanimous verdict that Respondent is a sexual predator. The Court orders Respondent committed to the custody of the Secretary of Social and Rehabilitation Services for control, care and treatment pursuant to K.S.A. 59-29a01 et seq.

Submitted by,

/s/ John C. Donham
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Approved by,

/s/ W. Scott Toth
W. Scott Toth
Special Assistant
Attorney General

/s/ Peter V. Ruddick
Peter V. Ruddick
Judge of the District Court